Supreme Court, U.S.
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No. 89-577

In The

Supreme Court of the United States

October Term, 1989

WALDO, R., INC., R. WALDO, INC.,
and RUSSELL WALDO, Individually,

Petitioners,

v.

PIPEFITTERS HEALTH AND WELFARE TRUST,
PIPEFITTERS PENSION TRUST
and
PIPEFITTERS LOCAL UNION NO. 562; JOHN MARSHALL,
administrator and fiduciary of all plaintiff funds;
LESTER GROSSL, JOE BARRY, DON DEVITT
and ROBERT MCDONALD, trustee,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

– AND APPENDICES –

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QUESTIONS PRESENTED

I.

MAY AN EMPLOYER AND A UNION ENTER INTO A 29 U.S.C. § 158(f) LABOR AGREEMENT FOR PIPEFITTERS AND PLUMBERS DURING THE PENDENCY OF AN EXTANT AGREEMENT COVERING PIPEFITTERS AND PLUMBERS BETWEEN THE EMPLOYER AND ANOTHER UNION?

II.

WHEN A CIRCUIT COURT MISCONSTRUES A 29 U.S.C. § 158(a) LABOR AGREEMENT AS A § 158(f) LABOR AGREEMENT WHICH WAS ENTERED INTO BETWEEN THE EMPLOYER AND A UNION WHILE A LABOR AGREEMENT BETWEEN THE EMPLOYER AND A DISTINCT UNION WAS EXTANT, DOES THE SECOND AGREEMENT BECOME VALID UPON THE EXPIRATION OF THE FIRST AGREEMENT?

III.

DOES A COURT OF APPEALS ABUSE ITS DISCRETION UNDER F.R.C.P. 52(a) BY REVERSING A DISTRICT COURT'S JUDGMENT WITHOUT HOLDING THE FINDINGS UPON WHICH THE JUDGMENT WAS BASED TO BE CLEARLY ERRONEOUS?

IV.

DOES A COURT OF APPEALS ABUSE ITS DISCRETION BY ENTERING A JUDGMENT WHICH CONFLICTS WITH A SUPREME COURT CASE, TWO OF ITS OWN CASES AND N.L.R.B. CASES ON THE SAME SUBJECT MATTER?

LIST OF PARTIES

The parties to the proceedings below were the petitioners Russell Waldo, R. Waldo, Inc. and Waldo, R., Inc., and respondents Pipefitters Health and Welfare Trust, Pipefitters Pension Trust and Pipefitters Local Union No. 562; John Marshall, administrator and fiduciary of the Respondent funds; Lester Grossl, Joe Barry, Don Devitt and Robert McDonald, trustees.

Petitioners R. Waldo, Inc. and Waldo, R., Inc. have no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT:	
I. THIS CASE PRESENTS AN IMPORTANT ISSUE OF FIRST IMPRESSION.	6
II. THE EIGHTH CIRCUIT HAS MISCONSTRUED 29 U.S.C. § 158(f) IN TWO RESPECTS AND MISAPPLIED 29 U.S.C. § 158(f).	9
III. THE EIGHTH CIRCUIT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND REVIEW BY REVERSING THE DISTRICT COURT WITHOUT HOLDING THE DISTRICT COURT'S FINDINGS TO BE CLEARLY ERRONEOUS.	11
IV. THE OPINION OF THE EIGHTH CIRCUIT IS IN CONFLICT WITH THE SUPREME COURT, WITH OTHER EIGHTH CIRCUIT DECISIONS, AND WITH NATIONAL LABOR RELATIONS BOARD DECISIONS.	13
CONCLUSION	15
APPENDICES:	
Appendix A — Order of Court of Appeals Denying Rehearing	A-1

Page

Appendix B — Opinion and Judgment of Court of Appeals B-1

Appendix C — Judgment and Memorandum of District Court C-1

Appendix D — Title 29 U.S.C. § 158(a)(1),(2) and (3) D-1

Appendix E — Title 29 U.S.C. § 158(f) E-1

TABLE OF AUTHORITIES

Cases:

Avco Group, 106 N.L.R.B. No. 174, 32 L.R.R.M. 1618 (1953) 7

General Cinema Corp., 214 N.L.R.B. No. 47, 87 L.R.R.M. 1563 (1974) 14

Greater St. Louis Construction Laborers Welfare Fund v. *Willman Jefferson Blacktop*, 753 F.2d. 648 (8th Cir. 1985) 8, 14, 15

Greater St. Louis Construction Laborers Welfare Fund v. *Willman Jefferson Blacktop*, 582 F. Supp. 1106 (E.D. Mo. 1984) 8, 14, 15

International Ladies Garment Workers v. *N.L.R.B.*, 366 U.S. 731 (1961) 10, 13

Jim McNeff, Inc. v. *Todd*, 461 U.S. 260 (1983) 10

R. Waldo, Inc., 280 N.L.R.B. No. 135 (1986) 14

Special Service Delivery, Inc., 259 N.L.R.B. No. 134, 109 L.R.R.M. 1061 (1982) 14

W. C. James, Inc. v. *Oil, Chemical and Atomic Workers International Union*, 646 F. 2d. 1293 (8th Cir. 1981) 11, 14

Page

STATUTES:

29 U.S.C. § 158(a) 6, 9, 10, 13, 14

29 U.S.C. § 158(b) 10, 13

29 U.S.C. § 158(f) 7, 8, 9, 10, 11

FEDERAL RULE:

Federal Rule of Civil Procedure 52(a) 11, 13

No. _____

In The

Supreme Court of the United States

October Term, 1989

WALDO, R., INC., R. WALDO, INC., and RUSSELL WALDO, Individually,

Petitioners,

v.

PIPEFITTERS HEALTH AND WELFARE TRUST, PIPEFITTERS PENSION TRUST and PIPEFITTERS LOCAL UNION NO. 562; JOHN MARSHALL, administrator and fiduciary of all plaintiff funds; LESTER GROSSL, JOE BARRY, DON DEVITT and ROBERT MCDONALD, trustee,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners Waldo, R., Inc., R. Waldo, Inc., and Russell Waldo respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in the above-entitled proceeding of April 17, 1989, the Petition for Rehearing being denied on July 6, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 872 F.2d 815, and is reprinted in the Appendix B, *infra*.

The memorandum decision of the United States District Court for the Eastern District of Missouri (Filipine, D.J.) has not been reported. It is reprinted in the Appendix C, *infra*.

JURISDICTION

Respondents commenced this action on September 14, 1984, pursuant to 29 U.S.C. §§ 1132 and 1145, and 29 U.S.C. § 185(a) (§ 301 of the Labor Management Relations Act) in the Eastern District of Missouri. On July 14, 1987, after a trial to the Court, the U.S. District Court for the Eastern District of Missouri entered judgment for the petitioners. See Appendix C, *infra*.

On respondents' appeals, the Eighth Circuit on April 17, 1989, entered judgment and an opinion reversing the District Court's judgment, and directed the District Court to determine whether monies are owed to respondents and to determine whether Russell Waldo should be individually liable for any such amount.

Petitioners filed a timely petition for rehearing which was denied by the Eighth Circuit on July 6, 1989. See Appendix A, *infra*.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves 29 U.S.C. § 158(a)(1), (2) and (3) and (f) and 29 U.S.C. § 185(a). See Appendices D and E, *infra*.

STATEMENT OF THE CASE

Petitioner Russell Waldo is the owner and sole shareholder of Waldo, R., Inc. and R. Waldo, Inc., the corporate petitioners. In 1984, respondents instituted this labor contract action seeking damages in the form of lost wages together with lost health and welfare benefits and pension benefits from petitioners' doublebreasted mechanical contracting operations. The complaint alleged that respondents had a valid contract with Waldo, R., Inc., but that they should have received the benefits from work done by the employees of R. Waldo, Inc.

The petitioners answered respondents' claims challenging the legality, efficacy and enforceability of the purported collective bargaining agreements between Local 562 and Waldo, R., Inc. as well as to their application to employees of R. Waldo, Inc.

Petitioner, R. Waldo, Inc. (hereinafter "R. Waldo") was a mechanical contracting company engaged in the plumbing, heating and air conditioning business which incorporated in 1975. R. Waldo enjoyed a continuous succession of collective bargaining labor agreements with the Congress of Independent Unions (hereinafter "C.I.U.") from 1975, the most recent relevant contract of which was effective for the three (3) year period from April 16, 1981 through April 15, 1984. The contract covered, *inter alia*, plumbers and pipefitters. In the District Court the parties stipulated the C.I.U. was a labor organization within the meaning of the Labor Management Relations Act. Although there was a subsequent 1984-1987 contract between R. Waldo and the C.I.U. which was later ordered abrogated by the National Labor Relations Board, neither that contract nor the N.L.R.B. action regarding that contract are at all relevant or material to this case.

In 1981, sometime after the 1981-1984 R. Waldo/C.I.U. contract went into effect, a representative of respondent Local 562 contacted Mr. Russell Waldo, the president of R. Waldo, requesting that he use some of Local 562's plumbers and pipefitters for R. Waldo's work. Again, in 1982, a business agent from Local 562 contacted Russell Waldo regarding the use of Local 562's plumbers and pipefitters by R. Waldo. The business agent admittedly knew of the existence of the 1981-1984 R. Waldo/C.I.U. contract covering plumbers and pipefitters. The business agent and Russell Waldo discussed the possibility of Mr. Waldo forming a separate corporation to employ Local 562 plumbers and pipefitters. Consequently, the respondent, Waldo R., Inc. (hereinafter "Waldo, R.") was formed for the sole purpose of aiding Local 562 in putting member plumbers and pipefitters to work doing the same mechanical contracting work as R. Waldo's employees were doing.

On October 1, 1982, Waldo, R. had no employees, no jobs, no anything except its articles of incorporation. Waldo, R., as with R. Waldo, was wholly owned by Russell Waldo. Waldo, R. never bid on a job. All of Waldo, R.'s work was solely as a subcontractor for R. Waldo. Nonetheless, on October 1, 1982, Waldo, R. signed the labor contract elicited by Local 562 which was due to expire on May 31, 1983, covering Local 562 plumbers and pipefitters notwithstanding the extant 1981-1984 R. Waldo/C.I.U. contract covering pipefitters and plumbers, and notwithstanding Waldo, R.'s lack of work, contracts or employees.

On December 1, 1982, Russell Waldo, pursuant to an understanding with Local 562, nominated eight (8) R. Waldo plumbers and pipefitters, employees who were also members of the C.I.U., to become Local 562 members and the initial employees of Waldo, R. who then

immediately began working on R. Waldo jobs as Local 562 members co-mingling with the R. Waldo employees who were members of the C.I.U., each company and its employees doing the same work on the same jobs.

Throughout 1983 and 1984, R. Waldo and Waldo, R., their respective plumber and pipefitter employees belonging to rival labor organizations, worked side by side on the same jobs, doing the same work out of the same building, and using the same equipment under common supervision. Never did either the C.I.U. or Local 562 utilize a formal grievance procedure concerning any of these activities.

On June 3, 1983, Waldo, R. and Local 562 entered into a subsequent agreement covering plumbers and pipefitters effective June 1, 1983 through May 31, 1986, notwithstanding the extant 1981-1984 R. Waldo/C.I.U. contract which covered, *inter alia*, plumbers and pipefitters.

The basic material issue raised by the pleadings is whether the 1982-1983 and the 1983-1986 Waldo, R./ Local 562 collective bargaining agreements are entitled to be honored and granted efficacy by the courts in the face of challenges to the legality of both under Title 29 U.S.C. §§ 158(a)(1) and (2) and Title 29 U.S.C. § 158(b).

While never pleaded, briefed or argued in the District Court, the Eighth Circuit's opinion gives rise to issues concerning Title 29 U.S.C. § 158(f) which, heretofore, have not been addressed by either the National Labor Relations Board or the courts.

The Eastern District of Missouri, finding that R. Waldo and Waldo, R. "were at all times the same entity," further found, as a matter of fact, that the Waldo, R./R. Waldo "operation was to be formed at the request of Local 562. . . ." The Eastern District of

Missouri, further finding 1) that the contract "between Waldo, R. and Local 562 was achieved by means of unfair labor practices," and 2) that "Such an agreement is illegal and will not be enforced," entered judgment for the petitioners.

The Eighth Circuit reversed the Eastern District of Missouri.

On an issue which was neither pleaded, argued nor briefed by respondents in the Eastern District of Missouri, nor found to be a fact by the trial court, the Eighth Circuit found, as a matter of fact, that the 1983-1986 Waldo, R./Local 562 contract was a "legal prehire agreement," and binding upon R. Waldo "upon the expiration of the [R. Waldo]/C.I.U. agreement on April 15, 1984." This finding and characterization of the agreement introduces a new concept into labor law.

Notwithstanding the rationalizing of the Eighth Circuit's opinion, the contract at issue *was not* a § 158(f) construction industry prehire agreement. Even if the respondents had pleaded, argued and briefed the existence of a "prehire agreement" in the Eastern District of Missouri, they would have been incorrect because Article 2 of the Waldo, R./Local 562 contract demonstrates it is a § 8(a) contract, not a § 8(f) contract.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS AN IMPORTANT ISSUE OF FIRST IMPRESSION.

Although not raised by either party in the pleadings or the pre-trial statements, nor briefed or argued in the District Court, nor incorporated in the findings of the

District Court, the Eighth Circuit, in reversing the District Court, found, as a matter of fact, that the parties had entered into prehire agreements.

The important language in the Eighth Circuit's opinion states:

> Although section 8(f) allows a construction employer to enter into a prehire agreement, this statutory provision says nothing about whether the employer may do so while bound by an earlier contract by another union.

Appendix B, page B-7. Petitioners agree with that statement and contend, contrary to the Eighth Circuit's judgment, that an employer may not enter into a § 8(f) contract while bound by an earlier contract with a rival union.

By deciding that an employer may enter into a § 8(f) contract for pipefitters and plumbers while bound by an earlier contract with a rival union covering pipefitters and plumbers, the Eighth Circuit created, out of whole cloth, a new concept in derogation of the doctrine of contract bar. "Contract bar" is a doctrine which voids a labor contract entered into by a labor organization which has not been certified with an employer during the pendency of a labor contract between the employer and a rival union. (See, *AVCO Group*, 106 N.L.R.B. No. 174, 32 L.R.R.M. 1618 (1953).)

Even though the C.I.U. contract was extant and even though Local 562 was neither certified nor had it attempted certification, the Eighth Circuit opined, "that R. Waldo became bound by the terms of the Pipefitters/[Waldo, R.] contract upon expiration of the [R. Waldo]/C.I.U. agreement on April 15, 1984."

This new concept is in direct conflict with all labor contract cases and is lacking in any support except the

Eighth Circuit's *per curiam* affirmance of *Greater St. Louis Construction Laborers Welfare Fund* v. *Willman Jefferson Blacktop*, 582 F.Supp. 1106 (E.D. Mo. 1984), at 753 F.2d 648 (8th Cir. 1985).

As discussed in Section II-A, *infra*, petitioners contend the contracts at issue are not, nor were they ever meant to be "prehire" agreements. However, even if they were prehire agreements, petitioners contend prehire agreements are subject to the same constraints placed upon any other labor contract by the Labor Management Relations Act except those excepted by the Congress in § 8(f) regarding lack of majority status and the reduction of the length of employment of employees from thirty days to seven days for mandatory union membership.

Neither the Congress nor the N.L.R.B. nor this Court has ever addressed the issue raised by the Eighth Circuit as to whether § 8(f) agreements are subject to the doctrine of contract bar.

Petitioners recognize that it is possible for a construction industry employer to enter into legal and valid § 8(f) prehire agreements with any number of distinct labor organizations if each such labor organization represented distinct classes of tradesmen. However, if present law were applied, that same employer could not enter into separate agreements with distinct labor organizations which represented the same class of tradesmen such as the plumbers and pipefitters represented by Local 562 and those represented by the C.I.U.

The Eighth Circuit's decision would allow, for the first time in the history of the N.L.R.B. and the Labor Management Relations Act, a union with no member employees, let alone a minority union, to enter into a

contract with an employer for particular tradecraftsmen while that employer had an extant agreement with a rival union which covered the same class of tradesmen.

This decision by the Eighth Circuit would surely allow rampant raiding and sniping by rival minority labor organizations within the construction industry if the Eighth Circuit's decision in this case remains as the only precedent. Such a consequence is antithetical to the intent and policy of Congress when it carved out the exceptions of § 8(f) to the requirements of § 8(a). Not only is it essential that this Honorable Court address this issue, but it should be addressed quickly.

Plenary review and consideration of this issue is essential.

II.

THE EIGHTH CIRCUIT HAS MISCONSTRUED 29 U.S.C. § 158(f) IN TWO RESPECTS AND MISAPPLIED 29 U.S.C. § 158(f).

A.

The Eighth Circuit has misconstrued § 8(f) of the Labor Relations Management Act by making a finding of fact that the Waldo, R./Local 562 agreements were "prehire" agreements.

In order to fully comprehend the Eighth Circuit's misconstruction of § 8(f) (Appendix E), it is necesssary to compare it with § 8(a) (Appendix D). Such juxtaposition reveals a clear difference between a § 8(a) contract and a § 8(f) prehire agreement. That clear difference is in the length of employment required prior to union membership. Section 8(a) allows the requirement of union membership "after the thirtieth day," while § 8(f) allows the requirement of union membership "after the

seventh day" of employment. *C.f., Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260, 263 n. 2, 103 S.Ct. 1753, 75 L.Ed2d 830 (1983). Both of the Waldo, R./Local 562 agreements are § 8(a) contracts as is evidenced by the language of Article 2 of such agreements which reads, in pertinent part:

> It is understood and agreed by and between the parties hereto that as a condition of continued employment, all persons who are hereafter employed by the Employer in the bargaining unit described in Section 1 of Article 1 shall become members of the Union not later than the thirtieth day following the beginning of their employment or the execution date of this agreement, whichever is the later, that the continued employment of persons who were in the employ of the Employer prior to the date of this agreement and who are not now members of the Union, shall be conditioned upon those persons becoming members of the Union not later than the thirtieth day following the execution date of this agreement.

Consequently, the Eighth Circuit not only made a conclusion of law regarding a fact which was never addressed in the Eastern District, it misconstrued the statute in order to make such a finding.

B.

Even if the Waldo, R./Local 562 contracts had been prehire agreements, the Eighth Circuit misconstrued and misapplied § 8(f). As noted in Section III, *infra*, the Eastern District made a finding that the Waldo, R./Local 562 agreements "were achieved by means of unfair labor practices." As in *International Ladies Garment Workers* v. *N.L.R.B.*, *infra*, the agreements in

the instant case were achieved in violation of 29 U.S.C. §§ 158(a) and (b)(1)(a). The Eighth Circuit apparently overlooked the following crucial language of § 8(f):

> "(not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice)"

The finding of the Eastern District was not, nor did the Eighth Circuit hold, that finding to be "clearly erroneous." In view of the Eastern District's finding and the wealth of evidence supporting it, the agreements could not have been anything but illegal and, therefore, void *ab initio.* See *W. C. James, Inc.* v. *Oil, Chemical and Atomic Workers International Union*, 646 F.2d 1293, 1295-1296 (8th Cir. 1981).

In overlooking the quoted language from § 8(f), the Eighth Circuit misconstrued the statute. By failing to give proper deference to the Eastern District's findings as required by F.R.C.P. 52(a), the Eighth Circuit misapplied § 8(f) to the facts.

III.

THE EIGHTH CIRCUIT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND REVIEW, BY REVERSING THE DISTRICT COURT WITHOUT HOLDING THE DISTRICT COURT'S FINDINGS OF FACT TO BE CLEARLY ERRONEOUS.

The Eastern District of Missouri made the following findings:

> 1. [Pursuant to a stipulation of the parties] Pipefitters Local 562 and the Congress of Independent Unions are labor organizations within 29 U.S.C. Section 152.

Appendix C, page C-2 *infra*. The Eighth Circuit has also affirmed that the C.I.U. was a labor organization

within 29 U.S.C. § 152 in its *per curiam* affirmance of *Greater St. Louis Construction Laborers Welfare Fund* v. *Willman Jefferson Blacktop*, 582 F.Supp. 1106 (E.D. Mo. 1984), at 753 F.2d 648 (8th Cir. 1985).

> 2. That Local 562 solicited the [Waldo, R.]/ Local 562 agreement for the purpose of shifting the construction work performed by [R. Waldo] and C.I.U. members to [Waldo, R.] and Local 562 members.

Appendix C, page C-3, *infra*. This finding was not only supported by a wealth of evidence, it is an undeniable conclusion based upon admissions in respondents' testimony.

> 3. That Local 562 was not at all surprised by the co-mingling [of R. Waldo/C.I.U. member employees and Waldo, R./Local 562 member employees] and probably expected it.

Appendix C, page C-4, *infra*. This finding is also supported by a wealth of evidence from respondents' business agent.

> 4. That the agreements between [Waldo, R.] and Local 562 are illegal in that they were achieved by means of unfair labor practices.

Appendix C, page C-5, *infra*. Again, this finding by the Eastern District of Missouri is absolutely inescapable due to the overwhelming testimony on this point.

The Eighth Circuit, in its judgment and decision, found not one of these findings to be "clearly erroneous." As a matter of fact, the Eighth Circuit failed to even make passing reference to the first of these findings. As to the fourth cited finding, the Eighth Circuit found the contracts to be legal because they were "pre-

hire" agreements. This finding is curious because the existence of a "prehire" agreement was neither pleaded, briefed or argued in the Eastern District. It was an immaterial issue raised first in the Eighth Circuit.

Nonetheless, the Eighth Circuit by reversing the Eastern District's judgment without finding the Eastern District's findings of fact to be clearly erroneous, as it must in reversing a judgment based upon those findings, departed from the accepted and mandatory stricture of Federal Rule of Civil Procedure 52(a).

IV.

THE OPINION OF THE EIGHTH CIRCUIT IS IN APPARENT CONFLICT WITH THE SUPREME COURT, WITH OTHER EIGHTH CIRCUIT DECISIONS, AND WITH NATIONAL LABOR RELATIONS BOARD DECISIONS.

This Court held in *International Ladies Garment Workers* v. *N.L.R.B.*, 366 U.S. 731, 737-738 (1961), a labor contract achieved and entered into by means of unfair labor practices in violation of §§ 8(a)(1), 8(a)(2) and 8(b)(1)(a) of the Labor Relations Management Act are illegal and unenforceable. The Eastern District of Missouri specifically found "that the agreements between . . . [the parties] . . . are illegal in that they were achieved by means of unfair labor practices." Appendix C, page C-5, *infra*.

Curiously, the Eighth Circuit did not hold that finding to be clearly erroneous as required for reversal by F.R.C.P. 52(a). The reversal of the Eastern District's judgment is even more curious in light of more than sufficient evidence to support the district court's finding. Consequently, under similar facts, the Eighth Circuit's judgment in this case is in direct conflict with this Court's decision in *Garment Workers, supra*.

Not only is the Eighth Circuit's judgment in direct conflict with that of the Supreme Court, it is also in direct conflict with its own *per curiam* decision at 753 F.2d 648 (8th Cir. 1985), affirming *Greater St. Louis Construction Laborers Welfare Fund* v. *Willman Jefferson Blacktop*, 582 F.Supp. 1106 (E.D. Mo. 1984), as well as its decision in *W. C. James, Inc.* v. *Oil, Chemical and Atomic Workers*, 646 F.2d. 1292, 1295-1296 (8th Cir. 1981).

Further, the Eighth Circuit's judgment is in direct conflict with National Labor Relations Board decisions in *General Cinema Corp.*, 214 N.L.R.B. No. 47, 87 L.R.R.M. 1563 (1974), and *Special Service Delivery, Inc.*, 259 N.L.R.B. No. 134, 109 L.R.R.M. 1061 (1982).

All of the cited cases hold that the labor contracts entered into by means of unfair labor practices in violation of § 8(a) are illegal and unenforceable, at least to the extent that a union cannot recover benefits for other than their specific members (*Jefferson Blacktop, supra*).

Another curiosity in the Eighth Circuit's analysis of the Eastern District's decision was its holding that the District Court decision is directly contrary to the findings of the National Labor Relations Board. Unfortunately, the Eighth Circuit has exhibited a misunderstanding of the N.L.R.B. decision in *R. Waldo, Inc.*, 280 N.L.R.B. No. 135 (1986). That case involved two (2) basic issues: 1) Did R. Waldo, Inc. commit § 8(a)(1) violations; and 2) Did R. Waldo, Inc. commit § 8(a)(2) violations, both in regard to an agreement entered into by and between R. Waldo, Inc. and the C.I.U. for 1984-1987. That case had *absolutely nothing* to do with the contracts at issue in the instant case.

The N.L.R.B. findings as to the C.I.U. did not entail a finding that the C.I.U. *was* nonunion, only that it was *considered* nonunion. *Id.* The Eighth Circuit, at 753 F.2d 648 (1985), in affirming *Greater St. Louis Construction Laborers Welfare Fund* v. *Willman Jefferson Blacktop*, 582 F. Supp. 1106 (E.D. Mo. 1984) found the C.I.U. to be a labor organization within the meaning of 29 U.S.C. § 152, a fact stipulated to by respondents in this case and found to be a fact by the Eastern District. (Appendix C, page C-2, *infra*).

Further, the N.L.R.B. made no findings that the 1981-1984 R. Waldo, Inc./C.I.U. agreement was improper, illegal or void nor did it find either R. Waldo or the C.I.U. were not bound by that agreement.

The 1981-1984 R. Waldo, Inc./C.I.U. contract has never been challenged by anyone much less either the respondents or the N.L.R.B.

The N.L.R.B. findings and decision as to the 1984-1987 R. Waldo/C.I.U. agreement have no bearing on this case.

CONCLUSION

In order to resolve an issue of first impression important to the public and to the construction industry, to resolve conflicts with other cases, and for the other

reasons set forth herein, this petition for certiorari should be granted.

Respectfully submitted,

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Dated: September 29, 1989

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

ORDER DENYING REHEARING

(United States Court of Appeals — Eighth Circuit)

(Dated July 6, 1989)

(Pipe Fitters Health and Welfare Trust, etc., et al., Appellants, vs. Waldo R. Inc., et al., Appellees – No. 88-1230 EM; Appeal from the United States District Court for the Eastern District of Missouri)

Appellees' petition for rehearing has been considered by the court and is denied.

July 6, 1989

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

OPINION AND JUDGMENT

(United States Court of Appeals — Eighth Circuit)

(Submitted: September 22, 1988)
(Filed: April 17, 1989)

(Pipe Fitters Health and Welfare Trust, Pipe Fitters Pension Trust and Pipe Fitters Local Union No. 562; John Marshall, administrator and fiduciary of all plaintiff funds; Lester Grossl, Joe Barry; Don Devitt and Robert McDonald, trustees, Appellants, v. Waldo R. Inc., R. Waldo, Inc., and Russell Waldo, Individually, Appellees — No. 88-1230; Appeal from the United States District Court for the Eastern District of Missouri)

Before HEANEY,* Circuit Judge, Ross, Senior Circuit Judge, and BOWMAN, Circuit Judge.

HEANEY, Senior Circuit Judge.

Pipefitters Health and Welfare Trust, Pipefitters Pension Trust, and Pipefitters Local Union No. 562 (collectively Pipefitters), brought suit under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1132 and 1145, and section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) to collect funds allegedly owed by the appellees, Waldo, R., Inc., R. Waldo, Inc. and Russell Waldo. Pipefitters allege that both companies and Waldo are liable for wages and contributions to employee benefit funds due under two consecutive collective bargaining agreements. Pipefitters challenge the district court's finding that the contract was illegal and unenforceable. We reverse and remand.

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* The Honorable Gerald W. Heaney assumed senior status on December 31, 1988.

BACKGROUND

Russell Waldo owns two construction companies, R. Waldo, Inc. and Waldo, R., Inc. Both companies are engaged in the business of mechanical contracting, such as plumbing, heating, air conditioning and underground piping. R. Waldo, Inc. had for several years negotiated collective bargaining agreements with the Congress of Independent Unions (CIU) covering all of the company's employees. The relevant collective bargaining agreement was in effect from 1981 to April 15, 1984. The agreement, ratified by the company's employees, provided that CIU would be the exclusive bargaining representative for all of R. Waldo's employees. It contained a union security clause, but no provision requiring the company to pay union dues or initiation fees to CIU.

In 1982, a business representative of Pipefitters had contact with some of the R. Waldo's employees about becoming members of Pipefitters. James O'Mara, another union representative, then contacted Russell Waldo about signing a collective bargaining agreement with Pipefitters. Waldo created a second corporation, Waldo, R., Inc., for the purpose of bidding for projects which required an AFL-CIO union work force, signed a collective bargaining agreement on behalf of Waldo, R., and then transferred eight of his employees to Waldo, R. Waldo promised O'Mara and the remaining employees that he would phase out R. Waldo operations as the work bid by that company was completed, and its employees could join Pipefitters when the CIU agreement expired in 1984.

Waldo, however, did not run the two construction companies as he had promised. Waldo, R. never bid on any projects and never had any work other than what it subcontracted from R. Waldo. Both corporations were

owned and operated by Russell Waldo. They were run out of the same office with the same personnel. The construction workers were paid from the same source, worked on the same projects and used the same equipment. The only difference between the two groups of employees was that employees of R. Waldo were paid pursuant to the CIU contract, and those of Waldo, R. were paid on the basis of the Pipefitters contract.

Pipefitters renewed its contract with Waldo, R. in 1983. This contract, effective from June 1, 1983, until May 31, 1986, contained provisions for direct payment to the union of initiation fees, dues and assessments,[1] and for contributions to an employee health and welfare trust fund[2] and pension fund.[3] Waldo apparently made the contributions to the fund for the eight Waldo, R. employees.

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[1] Article 6, section 1, provided in part:

> It is understood and agreed that the Employer will deduct * * * Union initiation fees and current dues and assessments, from the paycheck of all employees who are covered by this Agreement, and who have signed written legal assignments * * * . The monies so deducted under such assignments shall be from each weekly paycheck. The Employer further agrees to remit to the Union, immediately after the checkoff payday, all money so deducted from the paychecks of employees covered by this agreement.

[2] Article 14, section 2 of the Pipefitters contract provided in part:

> All Employers obligated to the terms and provisions of this collective bargaining agreement shall contribute, pay and remit to the Trustees of the Fund, at the office of the Fund, $3.53 per hour for each hour worked by each employee covered by this agreement * * * .

[3] Article 15, section 2 of the Pipefitters contract provided in part:

> All Employers obligated to the terms and provisions of this collective bargaining agreement shall contribute, pay and remit to the Trustees of the Fund, at the office of the Fund, $1.65 per hour for each hour worked by each employee covered by this agreement * * * .

In February of 1984, a business representative of CIU requested that Waldo negotiate a new CIU contract. Even though the R. Waldo employees unanimously voted against CIU representation, Waldo reneweed the CIU three-year contract, with a wage scale far below that of Pipefitters.[4] This contract was never ratified by R. Waldo employees. Pipefitters then brought a charge of unfair labor practices against Waldo and the CIU. The NLRB found that Waldo had engaged in unfair labor practices by renewing the CIU contract after the CIU has lost its majority support, by unlawfully coercing and discriminating against employees and by giving unlawful support to the CIU. The 1984 collective bargaining agreement was invalidated as a result.

Meanwhile, Pipefitters brought this action in federal district court in an attempt to hold Waldo, R., R. Waldo, and Russell Waldo, individually, liable for violations of the Pipefitters contract. Pipefitters allege that since January 1, 1984, Waldo, R. diverted AFL-CIO work to the nonunion R. Waldo employees, resulting in a loss of $90,000 in union wages. Pipefitters also allege that the work diversion resulted in a loss of $18,630 in pension payments, $40,805 in health and welfare payments, $9,000 in initiation fees, and $9,900 in union dues.

The district court refused to enforce the Pipefitters contract. First, the court held that Waldo was running a double-breasted operation and that Waldo, R. was the

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[4] The CIU wage scale was far below Local 562's $16.95 union wage scale. The journeymen rate for plumbers and pipefitters in the CIU agreement that expired 15 April 1984 was $10.93 * * * . Among the Company's eight employees in the bargaining unit in April (all of whom were later accepted as Local 562 members), three were paid * * * about $11 or $11.25 an hour, and three, less than $10 an hour.

R. Waldo, Inc., 280 N.L.R.B. No. 135 at 2 (1986) (citations omitted).

alter ego of R. Waldo, pointing to *Iowa Exp. Distribution, Inc.* v. *N.L.R.B.*, 739 F.2d 1305, 1310 (8th Cir.), *cert. denied*, 4669 U.S. 1088 (1984), to support this conclusion. Second, it found that the Pipefitters contract was illegal as one employer may not negotiate a collective bargaining agreement with another union when his employees are already represented by a union. We believe the district court's decision is directly contrary to the findings of the National Labor Relations Board. We further believe that the existence of the CIU contract did not preclude Waldo from operating a split shop and from entering into a prehire agreement with Pipefitters covering the construction workers employed by Waldo R.

DISCUSSION

I. JURISDICTION

Pipefitters allege that the district court has no jurisdiction to consider Waldo's defense that the execution of the Pipefitters contract constituted an unfair labor practice. We agree with the district court that *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982) gives it the authority to find collective bargaining agreements unenforceable if they violate federal labor law. As the Supreme Court recognized:

> As a general rule, federal courts do not have jurisdiction over activity which is "arguably subject to § 7 or § 8 of the NLRA," and they "must defer to the exclusive competence of the National Labor Relations Board." * * * [A] federal court has a duty to determine whether a contract violates federal law before enforcing it. * * * [A] court must reach the merits of an illegality defense in order to determine whether the contract clause at issue has any legal effect in the first place.

455 U.S. at 83-84 (citations omitted).

Thus, if, in a section 301 action, an employer asserts that a collective bargaining agreement is unenforceable due to an unfair labor practice on the part of the union, a federal court has jurisdiction to rule on that defense. *But cf. Glaziers & Glassworkers* v. *Custom Auto Glass Dist.*, 689 F.2d 1339, 1343 (9th Cir. 1982) (limiting jurisdiction to cases in which breach of contract constitutes unfair labor practice).

II. ILLEGALITY OF THE PIPEFITTERS AGREEMENT

We believe that the Pipefitters contract with Waldo, R. was a prehire agreement, valid by reason of 29 U.S.C. § 158(f).[5] Section 8(f) allows an employer in the construction industry to enter into a collective bargaining agreement with a minority union. *NLRB* v. *Local Union No. 103, Intern. Ass'n of Bridges, Structural and Ornamental Iron Workers*, 434 U.S. 335, 345 (1978); *Contractors, Laborers, Teamsters and Engineers Health & Welfare Plan* v. *Associated Wrecking Co.*, 638 F.2d 1128, 1130 (8th Cir. 1981). The enactment of this provision was in response to the particular needs of the construction industry.

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[5] 29 U.S.C. § 158(f) provides in part:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, * * * *Provided*, that nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

> During the Wagner Act period the Board declined to exercise jurisdiction over the [construction] industry. In 1947, after passage of the Taft-Hartley amendments, the Board applied the provisions of the Act to the industry with consequent difficulties. * * * In summary, prehire agreements which would otherwise be invalid were authorized in the construction industry because of the dual necessities (1) that construction bidders know in advance of bid what their labor costs would be, and (2) that construction employers have access to an available pool of skilled craftsmen for quick reference.

638 F.2d at 1131 (citations omitted).

It is true that Waldo, R. had no employees when it executed the Pipefitters contract in 1982. It is also true that Waldo, R. had not yet bid on any AFL-CIO projects. Yet, section 8(f) of the NLRA specifically allows an employer such as Waldo to enter into an agreement with a union in an attempt to assess his labor costs and to ensure an available work force *before* he bids on a project.

Although section 8(f) allows a construction employer to enter into a prehire agreement, this statutory provision says nothing about whether that employer may do so while bound by an earlier contract with another union. We believe that, under the unique circumstances of this case, no violation of the NLRA or public policy occurred when Waldo created his double-breasted operation and entered into the pre-hire contract with Pipefitters.

There is nothing in the NLRA which makes "double-breasted" operations illegal per se. It has become common practice for construction employers to establish separate companies, one working on union projects,

and another to operate on a nonunion basis. 1 Morris, *The Developing Labor Law* 676 (2ed. 1983). In *Carpenters' Local Union No. 1478* v. *Stevens*, 743 F.2d 1271 (9th Cir. 1984), the Court explained the purpose behind these operations:

> Such "double-breasted" operations allow a contractor to compete for both union and non-union work. The non-union company can bid competitively on jobs that do not require union contractors, while the union company continues to bid on jobs requiring union contractors.

Id. at 1275 (footnote omitted).

The theory of such an operation is that union and nonunion firms compete in different and separate markets. *Road Sprinkler Fitters Local Union No. 669* v. *N.L.R.B.*, 789 F.2d 9, 12 n.2 (D.C. Cir. 1986).

The National Labor Relations Board found that R. Waldo was considered a *nonunion* employer, paying *nonunion* wages under the 1981 CIU contract. 2 N.L.R.B. No. 135 at 2. It also found that Waldo set up Waldo, R. and transferred eight employees to that company in an effort to operate a union shop and to pay full union wages and benefits. *Id.* at 7. Waldo operated a "split" shop since 1982, with eight employees receiving union wages, and another group of employees receiving nonunion wages. *Id.*

Russell Waldo argues, however, that because Waldo R. was the alter ego of R. Waldo, neither company could legally enter into a contract with Pipefitters.

Although we agree with the district court that Waldo, R. became the alter ego of R. Waldo, we believe that Waldo cannot assert the alter ego doctrine as a method of avoiding his contractual obligations. First, this doctrine

was established to protect the rights of employees, not employers. *See Iowa Exp. Distribution, Inc.* v. *N.L.R.B.*, 739 F.2d at 1310-11. (non-signatory company will be held liable to collective bargaining agreement of alter ego signatory company when company was formed for purpose of avoiding union contract). An employer who enters into an agreement with a union and makes payments to that union pursuant to the agreement cannot later deny this contractual obligation merely because it dealt with two unions. *Greater Saint Louis Const.* v. *Willmon Jeff. Blacktop*, 582 F. Supp. 1106, 1109 (E.D. Mo. 1984), *aff'd*, 753 F.2d 648 (8th Cir. 1985) (per curiam). Thus, the alter ego doctrine is unavailable under the circumstances of this case and Waldo cannot assert it as a means of avoiding a contract he freely entered into.

Second, the CIU, the union allegedly harmed by the Pipefitters contract, never challenged the contract's validity even though it lost members to Pipefitters in 1982. The CIU lost the right to invalidate the Pipefitters contract when it was abandoned by Waldo's employees. Furthermore, Pipefitters made no attempt to enforce its contract until after the CIU contract had expired by its own terms in 1984. The only group in a position to assert the alter ego doctrine to void the Pipefitters contract is the employees of R. Waldo and they will not complain as they *want* to be covered by this contract. Thus, enforcement of the Pipefitters contract in this case harms no one.

The Pipefitters contract was a legal prehire agreement, entered into for the legitimate purpose of providing union wages and benefits to the employees of Waldo, R. The NLRB did not find objection with Waldo's decision to operate a "split" shop and neither do we. Nothing prevents Waldo from establishing a company for the purpose of contracting to do union work, and nothing

prevents Pipefitters from entering into a prehire agreement with the new corporation and to demand union wages for this work. In light of the fact that neither the CIU nor Waldo's employees sought to invalidate the Pipefitters contract and the fact that Waldo cannot assert the alter ego doctrine as a defense in this suit, we find that the Pipefitters collective bargaining agreement is enforceable.

We also believe that R. Waldo became bound by the terms of the Pipefitters contract upon the expiration of the CIU agreement on April 15, 1984. R. Waldo's employees expected this to occur and the NLRB found that Russell Waldo had promised to be so bound. Thus, any of Waldo's employees performing pipefitting or plumbing work after that date should have been paid union wages. Payments to the union trust funds should also have been made, regardless of whether the employees were members of the Pipefitters union.[6]

We do not decide the issue of whether Russell Waldo may be held personally liable for the contractual obligations of R. Waldo and Waldo, R. We remand to the district court the issue of individual liability to be resolved in a manner consistent with this opinion.

We therefore reverse and remand to the district court for a determination of whether any money is owed to Pipefitters as a result of this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[6] Article 14, section 2, and Article 15, section 2 of the Pipefitters contract provides that trust contributions shall be made regardless of whether the employee's name appears on the check-off list.

APPENDIX C

JUDGMENT AND MEMORANDUM

(United States District Court —
Eastern District of Missouri — Eastern Division)

(Filed: July 14, 1987)

(PIPEFITTERS HEALTH AND WELFARE TRUST, PIPEFITTERS PENSION TRUST, and PIPEFITTERS LOCAL UNION NO. 562, Plaintiffs, v. WALDO R. INC., R. WALDO, INC., and RUSSELL WALDO, Individually, Defendants — No. 84-2163 C(2))

JUDGMENT

In accordance with the Memorandum filed this day and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendants shall have judgment against plaintiffs on their claims for relief. Plaintiffs shall bear the costs of this action.

IT IS FURTHER ORDERED that plaintiffs' motion to amend is GRANTED.

IT IS FURTHER ORDEREED that defendants' motion to set aside the Stipulation and Agreement dated December 11, 1986 freezing funds is GRANTED and such Stipulation and Agreement is set aside.

Dated this 14th day of July, 1987.

/s/ Signed [*Illegible*]
UNITED STATES DISTRICT JUDGE

MEMORANDUM

This matter is here after trial to the Court for a decision on the merits. Plaintiffs bring this action under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1132 and 1145 and § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). These statutes give the Court jurisdiction.

Plaintiffs allege that defendants are liable for wages and contributions to employee benefit funds due under collective bargaining agreements. Although the collective bargaining agreements were signed only on behalf of Waldo, R. Inc. (WR), plaintiffs seek to hold R. Waldo, Inc. (RW) and Russell Waldo liable on alter ego and single employer theories. Pipefitters Health and Welfare Trust and Pipefitters Pension Trust are employee benefit plans under 29 U.S.C. § 1002. Pipefitters Local No. 562 and the Congress of Independent Unions are labor organizations within 29 U.S.C. § 152. The defendants are employers engaged in interstate commerce. Plaintiffs have moved to amend their complaint to add as plaintiffs John Marshall, administrator and fiduciary of the funds, and Lester Gross, Joe Barry, Don Devitt, and Robert McDonald, Trustees. The Court will grant this motion.

Russell Waldo is the owner of two construction companies, RW and WR. RW had been in existence about twelve years at the time of trial and had entered into collective bargaining agreements with the Congress of Independent Unions (CIU) for about eleven years. The relevant CIU collective bargaining agreement was effective from 1981 through April 15, 1984. The CIU is a rival union of plaintiff Local 562, and the CIU wage rate is approximately six dollars less than the Local 562 rate. The CIU agreement was ratified by the employees of RW

and provided that the CIU was the exclusive bargaining representative for those employees. The agreement also contained a union security clause.

At some time before 1982, a business representative of Local 562 had some contact with RW employees about becoming members of Local 562. Later, another business representative, James O'Mara, who testified at trial, contacted Russell Waldo, the owner of RW about signing a collective bargaining agreement with Local 562. The two, Russell Waldo and Mr. O'Mara decided that they should proceed by forming a separate corporation, WR, for the purpose of signing a collective bargaining agreement with Local 562. O'Mara testified that exactly how the corporation was formed was up to Waldo.

In 1982, despite the existence of the CIU agreement, Waldo and Local 562 entered into a collective bargaining agreement covering the WR employees. Waldo then selected eight CIU employees from RW and shifted them to WR. They became Local 562 members. The understanding of O'Mara was that Waldo would phase out the RW operation as the work bid by RW was completed, and the employees from RW would join Local 562 if they wished. O'Mara admitted that he knew the CIU/RW collective bargaining agreement was in effect at the time. He also knew that WR had no employees at the time of the agreements. Further, the union must have known that WR had no work at that time since WR had not bid any contracts. The Court finds that Local 562 solicited the WR/Local 562 agreement for the purpose of shifting the construction work performed by RW and CIU members to WR and Local 562 members.

The evidence shows that the two corporations were at all times the same entity. The WR and RW employees were treated as interchangeable. From the outset, WR

employees worked on projects bid by RW. When WR was formed, employees simply shifted from RW/CIU to WR/Local 562 in mid-project. WR never bid on any project and never had work other than work received from RW. Local 562 did not file a complaint about this co-mingling with the National Labor Relations Board. The Court finds that Local 562 was not at all surprised by the co-mingling and probably expected it. Local 562's complaint is, in effect, that the work was not completely shifted from CIU workers to Local 562 workers.

The overwhelming evidence shows that the two corporations were the same. Both corporations were owned and operated as one business by Russell Waldo. They were run from the same office with the same personnel. They were all paid from the same source, worked on the same projects, and used the same equipment. They even wore the same t-shirts. Despite this ongoing co-mingling of which Local 562 was aware, Local 562 entered into a second collective bargaining agreement with WR which was effective June 1, 1983 through May 31, 1986.

Plaintiffs now argue that WR and RW were alter egos so that the WR/Local 562 agreements apply to RW. This case presents an unusual application of the alter ego doctrine in the context of a double-breasted operation. Double-breasted operations, where there are related union and non-union shops, are not unusual. The typical dispute is over the employer's attempt to shift work from one corporation to another to avoid a collective bargaining agreement and pay non-union wages. *See Carpenters' Local Union No. 1478* v. *Stevens*, 743 F.2d 1271, 1275 (9th Cir. 1984). In this case, however, the double-breasted operation was to be formed at the request of Local 562 for the ultimate purpose of unionizing the whole of Russell Waldo's construction business.

It is clear that RW and WR are alter egos within the test set out by the Eighth Circuit. Defendants admitted this in connection with an unfair labor practice proceeding in the NLRB. Courts should look to the following factors: "substantially identical ownership, management and supervision, business purpose, operation, customers, and equipment." *Iowa Express Distribution, Inc.* v. *National Labor Relations Board*, 739 F.2d 1305, 1310 (8th Cir. 1984). Where these factors indicate that the entities are really the same and the evidence shows a shift from one to the other to avoid a collective bargaining agreement, the alter ego doctrine should be applied to bind both entities to the collective bargaining agreement. *Id.* at 1311.

Defendants argue that the two WR/Local 562 collective bargaining agreements are the product of unfair labor practices by the companies and Local 562 which make the contracts void. Plaintiffs response to this argument is that unfair labor practice issue cannot be raised in the district court. This Court disagrees. The Supreme Court, in *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 76-77 (1981), held that contracts which are illegal under federal labor law will not be enforced in § 301 suits. *See also W. C. James, Inc.* v. *Oil, Chemical and Atomic Workers International Union*, 646 F.2d 1293, 1295-96 (8th Cir. 1981) (collective bargaining agreement void *ab initio* when entered into with unlawful assistance of employer).

In the instant case, the Court finds that the agreements between the WR and Local 562 are illegal in that they were achieved by means of unfair labor practices.

Judge Meredith of this Court has considered the issue of whether a union and an employer can lawfully enter into a collective bargaining agreement at a time when

the employer has an existing collective bargaining agreement granting exclusive bargaining representative status to another union.

> The Court is aware that an employer whose employees are represented by one union may not negotiate a collective bargaining agreement with another union. *See Garment Workers* v. *Labor Board*, 366 U.S. 731, 737-38 (1961), 81 S.Ct. 1603, 1607-08, 6 L.Ed. 762 (1961). Such an agreement would be unenforceable, in most situations. *See Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 77, 83, 102 S.Ct. 851, 856, 859, 70 L.Ed. 833 (1983).

Greater St. Louis Construction Laborers Welfare Fund v. *Willman Jefferson Blacktop and Concrete Contractor, Inc.*, 582 F.Supp. 1106, 1109 (E.D.Mo. 1984) (§ 301 suit to recover contributions to pension funds). *aff'd* 753 F.2d 648 (8th Cir. 1985) (*per curiam*). This is not a case where Local 562 has been certified as the collective bargaining representative for all the employees of the construction businesses owned by Russell Waldo. Local 562 did not seek certification by the NLRB until 1984. Both of the collective bargaining agreements between Local 562 and WR were entered into at a time when RW had an existing collective bargaining agreement with the CIU. This agreement cannot be avoided by shifting the construction business to another corporate entity which is the alter ego to this original business. Such an agreement is illegal and will not be enforced under *Kaiser*.

Dated this 14th day of July, 1987.

/s/ Signed [*Illegible*]
UNITED STATES DISTRICT JUDGE

APPENDIX D

TITLE 29 U.S.C.

Section 158. Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees, in the exercise of the rights guaranteed in section 57 in this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment of any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later,

(i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership as not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

APPENDIX E

TITLE 29 U.S.C.

Section 158(f)

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

FILED
OCT 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-577

In The

Supreme Court of the United States

October Term, 1989

WALDO R., INC. R. WALDO, INC.
and RUSSELL WALDO, Individually

Petitioners,

v.

PIPEFITTERS HEALTH AND WELFARE TRUST,
PIPEFITTERS PENSION TRUST
and
PIPEFITTERS LOCAL UNION NO. 562; JOHN MARSHALL,
administrator and fiduciary of all plantiff funds;
LESTER GROSS, JOE BARRY, DON DEVITT
and ROBERT MCDONALD, trustees,

Respondents.

MEMORANDUM IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN H. GOFFSTEIN
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MEMORANDUM OPPOSING CERTIORARI

This case arose when a union and a trust fund acting as co-plaintiffs sought to collect monies due under a lawful and implemented pre-hire agreement where services were performed after a unanimous vote by employees and then subcontracted by the employer in breach of the labor agreement prior to its expiration. The defendants-petitioners after discovery admitted alter-ego status in the construction industry. The NLRB and Courts below found that the employer

by and through its sole shareholder and control person had commingled its operations in relevant respects. The circuits are uniform in holdings on such issues in that individual entities proceed at their own risk under such circumstances.

Since the factual issues are essentially undisputed, the Court of Appeals applied appropriate legal principles. Further, no unique policy issues are pending here and there is not reason for the Court to grant certiorari in this case.

Therefore, the Petition of Writ of Certiorari should be denied.

Respectfully submitted,

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and LANGE
130 South Bemiston Avenue
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October 27, 1989

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this 27th day of October, 1989 to Mr. Stuart W. Hyvonen, 602 Hancock, Saginaw, Michigan 48602 and John W. Ellinger, 497 East High Street, Jefferson City, Missouri 65101.

JOHN H. GOFFSTEIN

Supreme Court, U.S.
FILED
NOV 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

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and ROBERT MCDONALD, trustee,

Respondents.

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and
PIPEFITTERS LOCAL UNION NO. 562; JOHN MARSHALL,
administrator and fiduciary of all plaintiff funds;
LESTER GROSSL, JOE BARRY, DON DEVITT
and ROBERT MCDONALD, trustee,

Respondents.

PETITIONERS' REPLY MEMORANDUM

Respondents, in their opposing memorandum in Docket No. 89-577, present nothing more than a stark assertion that, in effect, Petitioners have presented nothing for the Court to review. Respondents cite no authority or cogent argument to either support their position or to demonstrate that Petitioners might be incorrect in their positions or the authorities in support of those positions. Petitioners contend that Respondents' memorandum is hollow because Respondents cannot find authority with which to rebut Petitioners' authoritative arguments.

The inability of the Respondents to face the issues presented in the petition, especially in light of the

importance and significance of these issues, bolsters the need for plenary review.

Respondents, in their opposing memorandum, have attempted to deceive this Honorable Court by suggesting that services were performed "after a unanimous vote by the employees . . . ." The attempted deception becomes manifest when it is considered that, at no time, was a National Labor Relations Board-sanctioned election ever conducted. The "unanimous vote" referred to by Respondents took place in the empty room of a tavern on May 7, 1984 — long *after* either of the two agreements at issue were signed. Further, the union check-off authorization cards, which were signed at the time of the non-sanctioned "unanimous vote," were invalidated by the N.L.R.B. At no time, either before, since or during the barroom referendum, has there ever been a sanctioned representation election.

Respondents also misrepresented the following facts in their opposing memorandum:

1. That the agreement(s) which are the subject of this case are "prehire" agreements; and
2. That such agreement(s) were "lawful."

Both statements are untrue. The agreements were 29 U.S.C. § 158(a) agreements and, because they were achieved by means of unfair labor practices, are either or both void and illegal and unenforceable.

Due to the Respondents' inability to present contrary argument to the Petitioners' positions, the cavalier attitude and approach they have taken with respect to that inability, and the misrepresentations in their memorandum suggests that summary reversal of the Eighth Circuit's Opinion and Judgment is in order

under Rules of the Supreme Court of the United States, Rule 23.1, thereby reinstating the judgment of the Eastern District of Missouri.

Respectfully submitted,

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